

## 48A C.J.S. Judges § 325

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### D. Objections to Judge and Proceedings Thereon

##### 3. Determination of Objection to Judge

## § 325. Peremptory disqualification on application or affidavit

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(4)

**Under some statutes, a party's right to substitute judges is absolute upon filing a motion within the statutory period, without proof of cause, and under other statutes, an affidavit of bias or prejudice if in proper statutory form is conclusive of the grounds stated.**

Under statutes providing for a limited number of peremptory challenges to a judge upon filing of timely application, a party's right to a change of judge is absolute.<sup>1</sup> Proof in support of a cause for a change of judge is not required,<sup>2</sup> and the court is without discretion as to whether to grant or deny a change.<sup>3</sup> A judge who fails to grant a timely application for change of judge is without jurisdiction.<sup>4</sup>

Under other statutes providing for disqualification upon the submission of a proper affidavit of bias and prejudice, the affidavit is regarded as conclusive of the right to a change of judge,<sup>5</sup> that is, the affidavit itself disqualifies the judge rather than the truth of the statements therein.<sup>6</sup> The constitutionality of statutes under which the affidavit is regarded as conclusive has been sustained.<sup>7</sup>

Under such statutes, reasons or facts showing bias or prejudice, or proof thereof, is not required.<sup>8</sup> While it has been held that good-faith belief in the existence of prejudice is alone sufficient to obtain disqualification on filing of an affidavit,<sup>9</sup> the court may not examine the motive of the moving party,<sup>10</sup> and proof of good faith need not be furnished.<sup>11</sup> Thus, in deciding whether the application has been filed in good faith, the court may consider only what is shown by its own records, pleadings, and files.<sup>12</sup>

Footnotes

- 1 Cal.—*People v. Superior Court*, 28 Cal. 4th 798, 123 Cal. Rptr. 2d 31, 50 P.3d 743 (2002).  
  
Ill.—*Chicago Transparent Products, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 337 Ill. App. 3d 931, 272 Ill. Dec. 719, 788 N.E.2d 23 (1st Dist. 2002).  
  
N.M.—*Quality Automotive Center, LLC v. Arrieta*, 2013-NMSC-041, 309 P.3d 80 (N.M. 2013).  
  
As to peremptory challenges, generally, see § 303.
- 2 Mo.—*Fulsom v. State*, 573 S.W.2d 116 (Mo. Ct. App. 1978).
- 3 Cal.—*Entente Design, Inc. v. Superior Court*, 214 Cal. App. 4th 385, 154 Cal. Rptr. 3d 216 (4th Dist. 2013).  
  
Ill.—*Niemerg v. Bonelli*, 344 Ill. App. 3d 459, 279 Ill. Dec. 244, 800 N.E.2d 86 (5th Dist. 2003).  
  
Ind.—*Poindexter v. State*, 268 Ind. 167, 374 N.E.2d 509 (1978).
- 4 Mo.—*State ex rel. Delgado v. Merrell*, 86 S.W.3d 468 (Mo. Ct. App. S.D. 2002).
- 5 Alaska—*In re G. K.*, 497 P.2d 914 (Alaska 1972).  
  
Idaho—*Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969).  
  
Wash.—*State ex rel. Tonasket v. Cottrell*, 92 Wash. 2d 606, 599 P.2d 1295 (1979).  
  
Wyo.—*State ex rel. Petro v. District Court of Sheridan County*, 389 P.2d 921 (Wyo. 1964).  
  
**"Prejudice"**  
The "prejudice" in the affidavit of prejudice statute is not prejudice in fact, but a statutory prejudice which may be established by the filing of an affidavit that contains nothing but conclusions, and a motion for a change of judge supported by an affidavit of prejudice is a statutory scheme for disqualifying a judge before whom a litigant or the litigant's attorney does not wish to try a case, for reasons good or bad or for no reason at all.  
  
Or.—*Taylor v. Gladden*, 232 Or. 599, 377 P.2d 14 (1962).
- 6 Ariz.—*Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955).  
  
Idaho—*State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).  
  
Mo.—*State v. Bunton*, 498 S.W.2d 67 (Mo. Ct. App. 1973).
- 7 N.M.—*State ex rel. Hannah v. Armijo*, 1933-NMSC-087, 38 N.M. 73, 28 P.2d 511 (1933).  
  
Or.—*U'Ren v. Bagley*, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173 (1926).
- 8 Alaska—*McKinnon v. State*, 526 P.2d 18 (Alaska 1974).  
  
Ariz.—*Truck Equipment Co. of Ariz. v. Vanlandingham*, 103 Ariz. 402, 442 P.2d 849 (1968).  
  
Idaho—*State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).  
  
Or.—*State ex rel. Kafoury v. Jones*, 315 Or. 201, 843 P.2d 932 (1992).
- 9 Cal.—*People v. Hall*, 86 Cal. App. 3d 753, 150 Cal. Rptr. 412 (1st Dist. 1978).

Or.—*State ex rel. Oliver v. Crookham*, 302 Or. 533, 731 P.2d 1018 (1987).

10 Mo.—*State v. Sullivan*, 486 S.W.2d 474 (Mo. 1972).

11 Or.—*State ex rel. Oliver v. Crookham*, 302 Or. 533, 731 P.2d 1018 (1987).

12 Mo.—*State ex rel. Darling & Co. v. Billings*, 435 S.W.2d 377 (Mo. 1968).

**Evidentiary hearing impermissible**

An evidentiary hearing before a judge or referee on the issue of the prosecuting attorney's good faith in filing an affidavit to disqualify the circuit judge in a criminal case was an impermissible procedure.

Mo.—*State ex rel. McNary v. Jones*, 472 S.W.2d 637 (Mo. Ct. App. 1971).

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